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BEFORE THE SURFACE TRANSPORTATION BOARD



EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS

BY

E. I. DU PONT DE NEMOURS AND COMPANY

In accordance with the Notice of Proposed Rulemaking (NPR) served on October 3, 2000, these Reply Comments are submitted on behalf of E. I. du Pont de Nemours and Company ("DuPont"). DuPont appreciates the opportunity to reply to the comments submitted by interested parties in response to the Board's October 3 decision and NPR in this proceeding.

## INTRODUCTION

As indicated in DuPont's previous comments in Ex Parte No. 582, and in this proceeding, the U.S. rail industry is clearly at a crossroads where the future is uncertain, the ground rules must change, and the status quo is no longer acceptable. DuPont welcomes and strongly supports the Board's new paradigm of seeking to enhance, rather than simply preserve competition with respect to major rail consolidations. However, the industry has already concentrated to such a degree that competitive remedies that reach beyond simply the next two merger partners are needed.

For the most part, the comments submitted by the Association of American Railroads ("AAR") and the individual railroads all exhibit an unwillingness to recognize that Board's previous policies for evaluating and conditioning railroad mergers are no longer suitable. The time has come for a broad change in those policies, and if the Board does not believe it is able to make these changes through merger policy alone, then a separate rulemaking or other approaches will be necessary. Such other approaches, as noted before by DuPont, include but are not limited to requesting additional statutory authority from Congress or facilitating private negotiations between railroads and their customers.

As noted in previous comments, captive chemical carload customers like DuPont must have access to balanced and sustainable rail-to-rail competition in order to meet their global business needs. The availability of such competition is essential to support the ability of DuPont and the rest of the U. S. economy to compete in world markets. Only through a choice of carriers can customers award freight based on superior safety, service, innovation and cost. And only through such incentive will railroad performance ever live up to its potential for the nation. As the Board has recognized in proposed 49 C.F.R. section 1180.1(a), and even by some of the major rail carriers (CSX Comments at 9-10), balanced and sustainable competition is, and must be, the central focus of the Board's policies and procedures.

**OVERALL NEED FOR SPECIFICITY**

A number of parties, in addition to DuPont (Comments at 3), noted that the Board's proposed rules in many respects lacked the necessary degree of specificity. See, e.g., NITL Comments at 10-14. Both railroads and their customers need to have a clear

understanding of the kinds of situations that must be addressed and the issues that can be raised. Railroads must be able to anticipate what conditions could be imposed on them in evaluating a possible merger. Their customers must know if, and to what degree, competition will truly be enhanced. Otherwise, the uncertainty will either discourage potentially beneficial combinations or allow new transactions to worsen the competitive situation even further.

**COMPETITIVE ISSUES**

A number of rail customer interests have urged the Board to address the matter of unbalanced application of any new policy arising from the application of any new policies, such as when, for example, a transaction would be subject to the new policy favoring "enhanced competition."[1] However, non-applicant rail carriers would be able to take advantage of opportunities to engage in enhanced competition with the applicants, but would not themselves be exposed to such enhanced competition. DuPont urges the Board to address this problem, which elicited several proposed solutions. See, e.g., NITL Comments at 15-18.

The Board should also keep in mind that several other commenting parties in addition to DuPont (Comments at 7) noted the need for a definitive process for obtaining a bona-fide rate for a bottleneck segment. See NPR at 15-16 and Joint Comments of American Chemistry Council and American Plastics Council at 8-9. DuPont has already suggested "baseball" type arbitration as a means for setting such rates. Comments at 7. This is a critical aspect of the Board's proposal that must be addressed more specifically in order for meaningful relief to be available.

**REPLY TO RAILROAD INDUSTRY POSITIONS**

As indicated above, the comments by the AAR and the individual major railroads exhibit a nearly uniform unwillingness to accept the need for pro-competitive changes in the Board's rail merger policies and procedures. There are many examples of this unwillingness in the discussion at pages 6-15 of the AAR comments; NS Comments at 5-9; CSX Comments at 35-49.

The most obvious example is the AAR's characterization of the Board's proposed revised policy statement, 49 C.F.R. § 1180.1(c). AAR contends that the Board has developed and is proposing to adopt three "presumptions" relating to the likely effect of future railroad control transactions. A thorough reading of the Board's proposed policy statement on public interest considerations does not show that the Board is proposing to establish any evidentiary presumptions.

The claim by the AAR and the railroads (e.g. CSX Comments at 25-38; Canadian Pacific Comments at 2 and BNSF Comments at 23-36) that the Board's proposed new policy establishes any "presumptions" about the competitive effects of rail mergers is a "straw man." The STB's proposed policy directs the applicants and the parties to address certain identified areas that the Board has recognized warrant primary consideration by the parties and the Board when determining whether future rail mergers will meet the statutory "public interest standard. The Board can, and must, draw on its own experience and expertise, as well as the record in this and the prior Ex Parte No. 582 proceeding (NPR At 9), to support its identification of the critical considerations.

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[1] In DuPont's comments, and others, the Board was urged to make it clear that enhanced competition should be primarily focussed on improving rail-to-rail competition.

Contrary to the railroads' assertions, in making its public interest determination, the Board is free to consider any matter that is relevant, not just whether a proposed merger has an "adverse effect" on competition. The five listed factors in the statute are only the minimum elements the Board must consider. The statute plainly states that when the Board is engaged in determining whether a proposed transaction "is consistent with the public interest" (49 U.S.C.A. § 11324(c), it "shall consider *at least*" the five enumerated factors in 49 U.S.C.A. § 11324(b)(emphasis added). The emphasized phrase clearly expresses Congress' intent that the Board it may consider other factors that are relevant to the public interest, such as those that arise from the Board's own experience with the current and future structure of the industry. For this reason, even though the Board and its predecessor have focussed primarily on adverse effects on competition, as contemplated by section 11324(b)(5), it is not limited in any way to only considering such effects. The Board clearly has statutory authority to require not just protection, but also enhancement of competition when it considers whether the public interest permits approval of or requires the conditioning of a railroad control transaction.

**SERVICE ISSUES**

There seems to be general support, even within the railroad industry, FOR the requirements for a service assurance plan and a service council by the railroads and others. Even the AAR seems to accept the need for such a requirement, albeit with reservations. AAR Comments at 20-21. See also CSX Comments at 50-57; but see NS Comments at 45-47.

However, there does not seem to be a willingness by the railroads to make a firm commitment to service levels nor to accept the consequences of failure to meet the plan.

Cf. AAR Comments at 21. As DuPont previously pointed out (Comments at 4-5), the latter is a critical incentive for any meaningful mechanism to assure efficient implementation of a service assurance plan. There is widespread support within the shipper community and federal government entities, for the Board to establish mechanisms for compensation for failure by merger applicants to achieve forecasted service levels. E.g. NITL Comments at 20-24; Joint Comments of American Chemistry Council and American Plastics Council at 13-14; U.S. Dep't. of Agriculture Comments at 18-19. Even with a requirement for service assurance plans (and the related service councils) there is no incentive for applicant railroads to avoid overstating the public benefits from maintaining predicted service levels.

**DOWNSTREAM EFFECTS**

The unwillingness of the rail industry to accept conditions that address potential downstream effects of a proposed transaction is unacceptable. If a predicted downstream effect does not occur, then the contingent condition would never become operative. However, the experience of Board and the rail customer community with the cumulative effects of the recent round of mergers means that this matter must be addressed by developing conditions that can be used to mitigate the cumulative impacts of rail mergers.

## CONCLUSION

DuPont again urges the Board to adhere to its stated objective of developing new merger policies and procedures that will assure that a more balanced and competitive rail industry will be the result.

Respectfully submitted,

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Dated: December 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of December, 2000, served a copy of the foregoing Reply Comments upon all parties of record, via first-class mail, in accordance with the Board's decisions in this proceeding and the Rules of Practice.

Frederic L. Wood

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